RECENT CASES.

BILLS AND NOTES — ALTERATION — PAYMENT. — The plaintiff certified a draft which had been raised from $76 to $7660, and subsequently paid it, having at the time of payment the means of knowing that the draft had been altered. *Held*, that the plaintiff is not entitled to recover the amount so paid. *Continental Bank* v. *Tradesman's Bank*, 55 N. Y. Sup. 545 (Sup. Ct., App. Div., First Dept.).

The court declines to discuss the effect of the certification, but argues that the plaintiff is not entitled to recover here in any event, having negligently paid the draft. But the mere fact that an acceptor negligently pays over money which the holder would otherwise be entitled to retain is not a sufficient reason for refusing to allow him to recover. Negligence in the mistaken payment of money is not necessarily a bar to recovery. *Appleton Bank* v. *McGilvray*, 4 Gray, 518. The decision might well have been placed upon the principle that, as between two innocent persons, one of whom must suffer, the legal title shall prevail. It must be admitted, however, that the Court could not consistently adopt this principle in view of the decisions which have allowed the drawee of a bill to recover where he has paid an altered bill without negligence, and which, however unsound in principle, seem to have established the law. *Bank of Commerce* v. *Union Bank*, 3 N. Y. 234.

BILLS AND NOTES — ASSIGNMENTS — INDORSEMENT. — Upon the back of a promissory note payable to his own order the defendant signed a writing which read: — "I hereby assign and transfer to F, all right, title, and interest that I may have in the within note." *Held*, that defendant is liable to a subsequent holder as an ordinary indorser. *Citizen's Nat. Bank* v. *Walton*, 31 S. E. Rep. 890 (Va.).

It is held in a majority of the American jurisdictions, as in the principal case, that the holder of a negotiable instrument who writes upon it an assignment of all his interest incurs all the liabilities of an ordinary indorser. *Markey* v. *Corey*, 108 Mich. 184; *Sears* v. *Lantz*, 47 Iowa, 658. It is argued in these cases that since a mere signature of the holder upon the back of a negotiable instrument gives to a subsequent rightful holder an authority to complete an indorsement in the name of such transferrer, a signature with the added words of assignment can have no less effect. But this reasoning seems fallacious. The plain import of the language is that the transferrer shall stand in the position of an assignor merely. The words of assignment exclude any implication of an authority to make him an indorser. A different construction subjects him to liabilities he has expressly indicated he did not intend to undertake. *Spencer* v. *Halpem*, 62 Ark. 595.

BILLS AND NOTES — FORGED CHECK — PAYMENT BY DRAWEE BANK. — Plaintiff bank, the drawee of a check, paid it to the defendant, an indorsee for value in due course. At the time both parties were ignorant of the forgery of the drawer's signature. *Held*, that the plaintiff cannot recover the money paid. *First National Bank of Marshalltown* v. *Marshalltown State Bank*,. 77 N. W. Rep. 1045 (Iowa).

The court considered the general doctrine that the drawee bank was precluded from recovery because it was conclusively presumed to know the signature of its depositors too narrow and placed their decision on the ground that present business conditions demanded the result reached. The principle was established in a case before Lord Mansfield. *Price* v. *Neal*, 3 Burr. 1354. His reasoning appears to discover the true ground of the doctrine. He argued that the defendant, having obtained the money should keep it unless it be against conscience for him to do so; that such is not the case when he has given value for the instrument in good faith, and then there is no reason for shifting the loss from one innocent man to another. Whatever the reasoning, the result of the principal case is law everywhere and it can be fully justified on the ground that as between equal equities the legal title should prevail. See 4 HARV. LAW REV. 297.

BILLS AND NOTES — INFANCY OF MAKER. — *Held*, that an infant can be sued by the payee on a note given for necessaries. *Melton* v. *Katzenstein*, 49 S. W. Rep. 173 (Tex., Civ. App.).

The principal case has the support of the weight of authority in this country. *Earle* v. *Reed*, 51 Mass. 387; *Dubose* v. *Wheddon*, 4 M'Cord, 221. The argument on the other side, however, seems sounder in principle. Even where an action is allowed against the infant on his contract for necessaries the prevailing rule restricts recovery to what the goods are reasonably worth. *Earle* v. *Reed*, *supra*. The result is an anomaly in procedure and indicates that the true nature of the infant's liability for necessaries is

quasi-contractual. That the question of consideration is open in the principal case is no answer to this suggestion, for in an action on the contract recovery should be the contract price irrespective of the amount of consideration given. Hence it seems that no action on the note should be allowed against the infant maker. *Williamson* v. *Watts*, 1 Camp. 552; *Fenton* v. *White*, 4 N. J. Law, 111; *Ayers* v. *Burns*, 87 Ind. 245.

CONSTITUTIONAL LAW — FOREIGN CRIMINALS — HABEAS CORPUS. — A sheriff, acting under the authority of the state of Idaho, was conducting a criminal, there convicted, from one to another part of that state. In so doing it was necessary to pass through the state of Washington. While in the latter state the criminal applied for his release on *habeas corpus* on the ground that he could not lawfully be detained there. *Held*, that such a discharge from the custody of the Idaho sheriff cannot be thus obtained, since to release the applicant would be violative of Const. U. S. art. 4, § 1, requiring that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." *In re Maney*, 55 Pac. Rep. 930 (Wash.).

There seems to be no authority on the question. It is clear that if a criminal of one state has fled into another he cannot be taken in the latter state by an officer acting under the authority of the former. *Cf. Bromley* v. *Hutchins*, 8 Vt. 193. Resort must be had to extradition proceedings by a demand on the governor of the second state. 1 Bishop, New Criminal Procedure, § 219. However, it is difficult to see why the reasoning of the principal case would not extend the clause of the constitution to such a case and allow such a taking. It seems one thing to say that a judgment shall be given full faith and credit, and another to say that it shall be enforced as in the state where it was given. The former meaning extends to a prohibition to deny its binding validity; for instance, that the title to certain land is in A. This is clearly within the intent of the constitution. But the latter meaning would render all the judicial process of one state as effectual in another state as in that from which it issued. The facts of the principal case bring it rather within the latter meaning. A contrary decision would not have denied that the conviction was a subsisting and valid one. *Cf. Lemmon* v. *People*, 20 N. Y. 562.

CONTRACTS — BENEFICIARY. — The defendant entered into a contract with the husband of the plaintiff whereby the husband was to aid the defendant in overthrowing a clause of a will; and in event of success the defendant agreed to pay the plaintiff $50,000. All conditions were performed but the defendant refused to pay. *Held*, that the plaintiff may recover the $50,000. *Buchanan* v. *Tilden*, 52 N. E. Rep. 724 (N. Y.). See NOTES.

CONTRACTS — FAILURE OF CONSIDERATION. — A father conveyed a farm to his son in consideration of the son's promise to support him during life. The son mortgaged the premises and refused to support the father. *Held*, that the father is entitled to a reconveyance free from the mortgage. *Payette* v. *Ferrier*, 55 Pac. Rep. 629 (Wash.). See NOTES.

CORPORATIONS — BANKRUPTCY — DISTRIBUTION OF ASSETS. — In the bankruptcy proceedings in regard to the firm of Higginson and Dean, it was shown that the Royal Bank of Liverpool had been a creditor of the firm, but that the Bank had been since dissolved. *Held*, that the claims of the defunct Bank pass to the Crown as *bona vacantia*. *Re Higginson & Dean*, 79 L. T. Rep. 673. See NOTES.

CORPORATIONS — ULTRA VIRES CONTRACTS — JUDGMENTS. — A bill in equity was filed by a corporation and some of its stockholders to set aside a judgment by consent, obtained in an action against the corporation on an *ultra vires* contract. *Held*, that the relief prayed should be granted, although collusion on the part of the corporate officers in consenting to the judgment was not proved. *Great Northwestern Central Ry.* v. *Charlebois*, [1899] App. Cas. 114 (P. C.); s. c. 26 Canada Sup. Ct. Rep. 221.

The effect, as *res judicata*, of a judgment against a corporation on an *ultra vires* contract is a difficult and undeveloped subject. Where the judgment is the judicial decision of an actual contest, the corporation and stockholders surely ought to be concluded thereby. Otherwise, questions of *ultra vires* would never be settled. Where the judgment is by consent, it may not possess the same character of finality. Indeed, it has been held that any judgment obtained by agreement of the parties, although effective as an estoppel so long as it stands, may be vacated for any cause which would vitiate the agreement by which it was obtained. *Huddersfield, &c. Co.* v. *Lister*, [1895] 2 Ch. D. 273. If this be law, and if it be beyond the powers of a corporation to consent to judgment on an *ultra vires* contract, the principal case would be correct. But it is surely within the legitimate scope of corporate business to determine whether any defence, including that of *ultra vires*, can successfully be raised in a pending action. Authority is curiously lacking on the precise point. If the entering

of judgment were a mere device on the part of the officers of the corporation to validate an *ultra vires* contract, the judgment would clearly be open to attack. Cf. *Nevil* v. *Clifford*, 55 Wis. 161. The somewhat analogous case of a judgment against a married woman has caused much diversity of opinion. 1 Black on Judgments, §§ 54, 55.

CRIMINAL LAW — COMMENTS ON DEFENDANT'S FAILURE TO TESTIFY. — A statute forbade the prosecution in a criminal case to comment on the failure of the defendant to testify in his own behalf. *Held*, that it is not error if the court make such comments. *Regina* v. *Rhodes*, [1899] 1 Q. B. D. 77.

Under a similar statute, *held*, it is reversible error for the prosecuting attorney to make such comments, even though the court subsequently instructed the jury to disregard them. *State* v. *Marceaux*, 24 So. Rep. 611 (La.).

The cases are of course distinguishable, but it cannot be doubted that the English case would not be followed in this country. All remarks of the court in criminal cases as to the credibility of witnesses and the weight of evidence, while allowed in England (see remarks of the court in the principal case), are in this country grounds for a new trial. *State* v. *Parker*, 66 N. C. 624; *Robeison* v. *State*, 24 So. Rep. 474 (Fla.). It seems that the English case deprives the prisoner of the protection which the statute was intended to give him, but since the case did not come under the words of the statute, the court refused to take from the presiding justice the power of supervision which is allowed in England. 1 Thompson, Trials, 209, 210.

CRIMINAL LAW — PROVOCATION — MERE WORDS. — The deceased ravished the prisoner's daughter. When upbraided by the prisoner he made a taunting reply, and the prisoner killed him. *Held*, that the question whether such words constituted a reasonable provocation should have been left to the jury. *State* v. *Grugin*, 47 S. W. Rep. 1058 (Mo.). See NOTES.

CRIMINAL LAW — SMUGGLING. — Diamonds intended to be smuggled were seized by a revenue officer before they were actually brought ashore from the ship. *Held*, that these facts will not justify a conviction for smuggling. *Keck* v. *U. S.*, 19 Sup. Ct. Rep. 254. See NOTES.

CRIMINAL LAW — STATUTORY OFFENCES REQUIRING NO INTENT. — The defendant was indicted, under a statute, for selling adulterated milk. He proved that the milk was adulterated while being delivered, by some unknown person not in his employ and without any negligence on his part. *Held*, that this is no defence. *Parker* v. *Allen*, [1899] 1 Q. B. D. 20.

It is well settled that statutory offences of this sort, being mere breaches of police regulations or torts against the public, require no criminal intent. *Com.* v. *Farrer*, 9 Allen, 489; *Com.* v. *Weiss*, 139 Pa. St. 247. *Contra*, *Teague* v. *State*, 25 Tex. App. 577; *Mulreed* v. *State*, 107 Ind. 62. No intent being necessary, the only question is, whether the defendant did the criminal act, and if he sold the article in an adulterated condition, as in the principal case, it would seem immaterial how the article came to be in that condition. A previous English case has held the defendant liable when the condition of the article sold was due to acts of the defendant's employees, although done against his express orders. *Brown* v. *Foot*, L. T. N. S. 649. The principal case goes further than any previous decision, but it is correct on principle. See 12 Amer. Law Rev. 469.

EVIDENCE — CHARACTER — CIVIL SUIT. — The deceased, while crossing the defendants' tracks, was struck by a train, the only eye-witnesses being the engineer and fireman. In an action to recover damages for causing the death, *Held*, that evidence that deceased was a careful man, and had previously used this crossing with due care, is admissible on the issue of his contributory negligence. *Missouri Pac. Ry. Co.* v. *Moffatt*, 55 Pac. Rep. 837 (Kan., Sup. Ct.).

A rule of evidence excludes the use of general reputation or actual character as a basis of inference to conduct. *Missouri, &c., Ry. Co.* v. *Johnson*, 48 S. W. Rep. 568 (Tex.). Some courts admit an exception where there are no eye-witnesses to the accident, on the ground that it is the best evidence to be had. *Chicago, &c. Ry. Co.* v. *Clark*, 108 Ill. 113. Even in such cases the evidence is equally open to the true objection, namely, that it is too slight and conjectural, and tends to prejudice the minds of the jury. That one must bring the best evidence he can, and that if he does it is enough, was a useful principle in the last century, when the law of evidence was forming. It has now outgrown its usefulness, and may be considered obsolete as a working rule. Therefore, where the above-mentioned exception has become established, it seems better to confine it to the letter, and to exclude the evidence when there are any eye-witnesses to the accident. Consequently the principal case might better have been decided the other way. See 12 HARV. LAW REV. 500.

EVIDENCE — MALICE — TESTIMONY OF PARTY. — In an action on an attachment bond for maliciously suing out an attachment, defendant was not allowed to testify that in suing out the attachment he had no ill will or malice. *Held*, that the testimony was rightly excluded. *Hamilton* v. *Maxwell*, 24 S. Rep. 679 (Ala.).

Although "malice in law" is merely the negation of justification or excuse, yet even if the defendant acted without probable cause, he still has an excuse if he did not act in bad faith. *Mitchell* v. *Jenkins*, 5 B. & Ad. 588; 14 Law Quarterly Review, 130. It is therefore material to determine whether he entertained ill will at the time of the attachment. Alabama has held that parties should not be allowed to testify to uncommunicated motives of their own conduct. *Hening* v. *Skaggs*, 62 Ala. 180. However, the general doctrine in such cases is that direct testimony of intention should be received. *Jefferds* v. *Alvard*, 151 Mass. 94. It is true that the evidence is subject to grave suspicion, but this should go simply to determine its weight and not its admissibility. Now that parties to an action are allowed to testify, none of the excluding rules forbid the introduction of such testimony, and it would seem better to admit it and leave its worth to be determined by the jury.

LIFE INSURANCE — ASSIGNMENT OF POLICY — INSURABLE INTEREST. — *Held*, that a valid policy of life insurance may be assigned to a person having no insurable interest in the life of the insured. *Steinback* v. *Diepenbrock*, 52 N. E. Rep. 662 (N. Y.).

Contracts of insurance entered into by persons who have no insurable interest in the life of the insured are regarded as wagering contracts and therefore void on grounds of public policy. But the authorities generally support the principal case and hold that a policy valid in its inception may be assigned to one without such interest. *Mutual Life Ins. Co.* v. *Allen*, 138 Mass. 24. Some jurisdictions have held that the same public policy that invalidates a contract of insurance made by one who has no insurable interest invalidates the assignment of a policy to such person. *Carpenter* v. *U. S. Life Ins. Co.*, 161 Pa. 9; *Price* v. *Supreme Lodge K. of H.*, 68 Tex. 361. And these cases have the support of a *dictum* of the Supreme Court of the United States in *Wamock* v. *Davis*, 104 U. S. 775. The tendency of the recent decisions in these States, however, is to hold the assignment valid, but to consider it, whenever possible, as having been made for purposes of security merely, thus compelling the assignee, after satisfying his claim, to hand over the proceeds of the policy to the representatives of the insured. *Schonfield* v. *Turner*, 75 Tex. 324.

PROPERTY — ADVERSE HOLDING — INTERRUPTION OF POSSESSION. — During the occupancy of a tenant in adverse possession of land the premises were sold at a tax sale and conveyed by the vendee to the demandant, but the actual possession was undisturbed. *Held*, that this was not an interruption of the adverse holding. *Harrison* v. *Dolan*, 52 N. E. Rep. 513 (Mass.).

Though there are few decisions as to the effect of tax sales upon the continuity of adverse possession, the better view seems to be that they act as an interruption. *Daveis* v. *Collins*, 43 Fed. Rep. 31. The present case suggests the other view, that a mere change of title without interruption of actual possession, in order to break the continuity, must be one that puts it where it is above the Statute of Limitations, as in the sovereign. For example, forfeiture to the State, for taxes or otherwise, of land held in adverse possession is an interruption of the adverse holding, although the actual possession is undisturbed. This is because the Statutes of Limitations do not generally run against the State, and, therefore, the moment the State obtains its legal title, there is a breach in the continuity of possession. *Armstrong* v. *Morril*, 14 Wall. 120; *Braxton* v. *Rich*, 47 Fed. Rep. 178. The present case is undoubtedly correct, however, as by the old rule of the common law, in force at that time in Massachusetts, but since changed by statute, the purchaser at the tax sale, not being in possession, could convey no valid title to the demandant as against the tenant. *McMahan* v. *Bowe*, 114 Mass. 140.

PROPERTY — ASSIGNMENT OF LEASE — COVENANTS. — A lessee for years of real estate agreed to convey his interest to the plaintiff, who entered on the land and paid rent directly to the lessor. *Held*, that the plaintiff is not entitled to enforce a covenant made by the lessor to the lessee, his executors, administrators and assigns. *Friary, &c. Breweries* v. *Singleton*, [1899] 1 Ch. D. 86.

The propriety of the above decision can scarcely be questioned. The situation of the parties is, however, a novel one, and there appears to be very little authority on point. It has been decided that an equitable assignee of a lease is not liable to the lessor on the lessee's covenants. *Cox* v. *Bishop*, 8 De G. M. & G. 815. The plaintiff in fact cannot stand in the relation of a tenant to the defendant although he has been paying him rent, for there is still an unexpired term in the original lessee. While there is no legal relation between the parties, the plaintiff is justly entitled to the benefit of the lessor's covenant. His appropriate remedy is in equity by obtaining an actual assignment of the lease.

PROPERTY — BOUNDARIES — HOUSES. — The grantor described a boundary line as "commencing twelve and one-half feet east of said house." *Held*, that in absence of evidence to show a contrary intention the distance is to be measured from the foundation of the house. *Kendall* v. *Green*, 42 Atl. Rep. 178 (N. H.).

The court treats the question as one of fact, purely, and seeks the intention of the parties, taking judicial notice of the "uniformly recognized practice of men to measure boundary lines on the ground." That both the treatment of the question and the result reached are correct can hardly admit of a doubt. *Centre St. Church* v. *Machias Hotel Co.*, 51 Me. 413. In an early case the opposite view was taken, the court apparently thinking that whenever a building is described as a base of measurement the edge of the eaves is the line of demarcation. *Millett* v. *Fowle*, 62 Mass. 150. When a house is described as itself the boundary, or when it is conveyed, the line is established by the edge of the eaves, but it is clear that these cases rest on grounds of their own, and do not warrant the laying down of a general rule of construction.

PROPERTY — FIXTURES. — One V, in possession of land under a contract to purchase from the plaintiff, allowed the defendant to erect thereon a small building, agreeing that it should be regarded as personalty and removable at defendant's will. The contract for the purchase of the land was rescinded. *Held*, that the defendant may remove the building, although as between the plaintiff and V it had become part of the realty. *Brannon* v. *Vaughan*, 48 S. W. Rep. 909 (Ark.).

The question which is here presented, has often been raised between a chattel mortgagee and the mortgagee of the land, when the chattel has been annexed to the freehold subsequently to the execution of the real estate mortgage. The authorities are very much in conflict whether or not a special agreement between the chattel mortgagor and mortgagee will prevent the chattel from becoming subject to the mortgage of the realty. *Cf.* in accord with principal case, *Tifft* v. *Horton*, 53 N. Y. 380; *Crippen* v. *Morrison*, 13 Mich. 23. *Contra*, *Bass Foundry* v. *Gallentine*, 99 Ind. 525; *Hunt* v. *Bay State Iron Co.*, 97 Mass. 279. The principal case has adopted the juster view. No good reason is apparent for depriving the defendant of his security in order to bestow upon the plaintiff an advantage which he has not bargained for or in any way relied upon. Cf. *Davenport* v. *Shants*, 43 Vt. 546.

PROPERTY — FIXTURES — CONDITIONAL SALE. — In a contract for sale of chattels intended to be annexed to the soil, it was stipulated that the title should not pass until the price was fully paid. The chattels were annexed, but the price was not paid as agreed. *Held*, that the seller may assert his title as against a subsequent mortgagee of the land for value and without notice. *W. T. Adams Machine Co.* v. *Interstate Building & Loan Assn.*, 24 So. Rep. 857 (Ala.).

There is a direct conflict of authority on this point. Some jurisdictions hold, in accord with the present case, that such an agreement in a sale of chattels preserves their character as personalty, and that the subsequent mortgagee gets no interest in them although they are annexed to the realty. *Ford* v. *Cobb*, 20 N. Y. 344; *Warren* v. *Liddell*, 110 Ala. 232. Another view is that even though the chattels under such an agreement are annexed to the freehold after the mortgage of the realty, the mortgagee gets a title to them paramount to that of the original vendor. *Clary* v. *Owen*, 15 Gray, 522. The better doctrine would seem to be, however, that the mortgagee of the realty in such case should be allowed to hold all fixtures which would naturally pass as incident to the realty, and upon consideration of which he, in good faith, advanced his money; but that the original vendor should be allowed to prevail where the chattels were annexed after the mortgage of the realty, or where the mortgagee did not advance his money on faith of their passing under the mortgage. *Davenport* v. *Shants*, 43 Vt. 546.

PROPERTY — GIFTS MORTIS CAUSA — DELIVERY. — A wife, on her deathbed, directed her husband to deliver all her property to her nephew. *Held*, that this was a valid gift *mortis causa* of personal property then in possession of the husband, and constituted him trustee for the nephew. *Caylor* v. *Caylor's Estate*, 52 N. E. Rep. 465 (Ind.).

The general rule is that delivery is essential to every valid gift of chattels. It is settled, however, in the case of gifts *inter vivos*, that possession in the donee at the time of the gift is not a fatal objection, and, in accord with the principal case, some jurisdictions extend the doctrine to gifts *mortis causa*. *Southerland* v. *Southerland*, 5 Bush, 591. The authority, nevertheless, is decidedly the other way. *Drew* v. *Hagerty*, 81 Me. 231; *Cutting* v. *Gilman*, 41 N. H. 147; *French* v. *Raymond*, 39 Vt. 623. The latter cases argue that the general policy of the law is against gifts *mortis causa*, and that all rules regarding them should be strictly enforced. This seems a sufficient ground for requiring an actual delivery at the time of the gift. Delivery

may be regarded as performing a function similar to execution in the case of a will, and a relaxation in the rules requiring this solemnity is a departure from the safeguards which the law has placed around all acts of a testamentary nature.

PROPERTY — LOSS OF LIEN. — *Held*, that one who has a lien upon live stock for its keep does not lose his lien by levying an attachment upon the stock. *Lambert* v. *Nicklass*, 31 S. E. Rep. 951 (W. Va.).

There is singularly little authority upon the question here decided. Of the three cases which are directly in point, two, *Jacobs* v. *Latour*, 5 Bing. 130, and *Legg* v. *Willard*, 17 Pick. 140, are in agreement with, and the other, *Arrendale* v. *Morgan*, 5 Sneed, 703, is contrary to the principal case. It seems that sound reasoning requires a different conclusion than is here reached. That possession is a necessary element to the existence of a lien is fundamental. *Forth* v. *Simpson*, 13 Q. B. 680. But the lien-holder gives up possession of the goods when he permits them to be taken on attachment, and the possession of the sheriff is equally distinct from the previous possession of the lien-holder, whether the attachment is made at his or at a third party's suit. In the former case, as in the latter, the sheriff is not the agent of the attaching creditor, but is acting as the representative of the law, nor is anything gained by saying that the view taken as to the necessity of the lien-holder continuing in possession is technical, since it is based upon the fundamental conception of the nature of a lien.

QUASI-CONTRACTS — LEASE — ASSIGNMENT — LIABILITY OF SUB-LESSEE OF ASSIGNEE. — An assignee of a term made a sub-lease to defendant, who covenanted to pay out of the rents and profits the rent accruing to the superior landlord. The original lessee, having been compelled to pay to the lessor rent which accrued while defendant was in possession, brought this action against the latter to recover the amount thus paid. *Held*, that the action cannot be maintained. *Bonner* v. *Tottenham, &c. Society*, [1899] 1 Q. B. D. 161.

If the defendant had been an assignee of the term instead of a sub-lessee, plaintiff would have recovered. *Moule* v. *Garrett*, L. R. 7 Ex. 101. There, however, the lessor would have had a direct remedy against defendant on the covenant which would have run with the land. Both plaintiff and defendant being bound to the lessor, the former would be regarded as a surety for defendant, and entitled to a surety's remedies against him. The actual case is different, in that there was no privity of contract or estate between the original lessor and defendant; so that in England defendant incurred no liability at law to the former. Defendant's contract was made with his own lessee to discharge the latter's obligation to the superior landlord. In many of the United States, the beneficiary in such a case would be allowed to sue at law. Where that rule prevails the present case would seem to fall within the principle of *Moule* v. *Garrett*, *supra*. According to the best American authorities, however, the landlord is not permitted to proceed at law, but he is entitled, in equity, to the benefit of defendant's promise, and may enforce specific performance thereof. *Keller* v. *Ashford*, 133 U. S. 610. To the lessor's right in this regard the plaintiff, on paying the rent, would be subrogated. That very equitable and just doctrine has never been squarely adopted in England, and the principal case is especially interesting because of a *dictum* that some such remedy may exist.

TORTS — GRATUITOUS BAILMENT — DUTY OF CARE. — The defendant lent his steam engine gratuitously to the plaintiff, without knowledge of any defect in it. The boiler of the engine burst and plaintiff was injured. *Held*, defendant is not liable for negligence in not finding out the defect, and informing the plaintiff of it. *Coughlin* v. *Gillison*, [1899] 1 Q. B. D. 145.

The case follows the English authorities. *Blackmore* v. *Bristol Railway*, 8 E. & B. 1035; *MacCarthy* v. *Young*, 6 H. & N. 329. The line seems to be sharply drawn, that in the case of gratuitous lending, the bailor is not liable unless he has knowledge of the defect, while if the bailment is for hire, the bailor must use due care to find hidden defects. *Hyman* v. *Nye*, 6 Q. B. Div. 685; *Fowler* v. *Locke*, 7 C. P. 272. The law in this country, as regards bailments for hire, seems to agree with the English doctrine. *Horne* v. *Meakin*, 115 Mass. 326; *Hadley* v. *Cross*, 34 Vt. 586; *Windle* v. *Jordan*, 75 Me. 149. It is very probable that the principal case would be followed also, but there is very little authority on the point. See Schouler, Bailments, 3d ed., § 79; 5 HARV. LAW REV. 222.

TORTS — NEGLIGENCE — LAW AND FACT. — *Held*, that where the evidence is not contradictory, proximate cause is a question of law to be determined by the court and not a question of fact to be submitted to the jury. *Schwartz* v. *Shull*, 31 S. E. Rep. 914 (W. Va.).

It is often difficult to determine whether the application of a given rule of law to the facts is for the court or for the jury. If the rule of law is clearly defined and the appli-

cation of the facts to it comes within the general experience of mankind it is usually held to be for the jury. Such a rule, for example, is the ordinary rule of due care. *Bridges* v. *The North London R. R. Co.*, L. R. 7 H. L. 213. If, however, the rule is not clearly formulated, and if the definition, as far as it can be given, is difficult for those untrained in law to understand and so is liable to great misuse, as in the case with the rule of proximate cause, the application is for the court. *Pike* v. *Grand Trunk R. R. Co.*, 39 Fed. Rep. 255. The question whether the facts in a case come within a given rule of law, is however, always a question of fact, be it for the jury or for the court, and never a question of law as the court in the present case seem to consider it. See 4 HARV. LAW REV. 147.

TRUSTS — COLLECTING BANK — FOLLOWING TRUST FUNDS. — X deposited a draft with bank A for collection, which sent the draft to Bank B, its correspondent. Bank B collected it, credited the account of bank A with the amount, and after bank A became insolvent paid the proceeds of the draft to the receiver. *Held*, that X is entitled to the proceeds. *Guignon* v. *First Nat. Bank*, 55 Pac. Rep. 1051 (Mont.).

The decision is sound and finds support in numerous authorities. *Com. Nat'l Bank* v. *Hamilton Nat. Bank*, 42 Fed. Rep. 880; *Henderson* v. *O'Conor*, 106 Cal. 385; *Com. Bank* v. *Armstrong*, 148 U. S. 50. Ordinarily, payment by the sub-agent bank will change the relation between the agent bank and the depositor from that of trust to one of debtor and creditor. But the clearest principles of justice prevent the bank from assuming the position of a debtor to its depositor after its known insolvency. *Mfgr's Nat. Bank* v. *Continental Bank*, 148 Mass. 553.

TRUSTS — EQUITABLE ASSIGNMENTS — NOTICE TO TRUSTEES. — A *cestui que trust* of personalty assigned his interest, the assignee giving notice of his claim to all the trustees then in office. Subsequently the trustees were changed. The *cestui que trust* then fraudulently executed a second assignment of his interest, and the second assignee brought his claim to the knowledge of the new trustees before they had heard of the first assignment. *Held*, that the first assignment has priority over the second. *In re Wasdale*, [1899] 1 Ch. D. 163.

It has long been a well established doctrine in England that the assignee of an equitable interest in personalty must give notice to the trustees of the legal title in order to render his claim secure. *Dearle* v. *Hall*, 3 Russ. 1; *Foster* v. *Cockerell*, 3 Cl. & F. 456. It has been further held that security, gained for the time being by notice to one of several trustees, may be lost by the death or retirement of that trustee from office, if a later incumbrancer is the first to bring his claim to the knowledge of the surviving trustees. *Timson* v. *Ramsbottom*, 2 Keen, 35; *In re Hall*, 7 L. R. Ir. 180. The tendency of these decisions, designed for the protection of subsequent incumbrancers who have acted in good faith and with due care, seems opposed to the holding in the principal case, for after a complete change of trustees the second incumbrancer, at the time of his transaction, is equally unprotected whether all or merely one of the original trustees were informed of the first assignment. The restriction here placed upon the doctrine of *Dearle* v. *Hall*, *supra*, appears arbitrary rather than logical. Yet the result reached is in accord with a sound principle that of two conflicting equities against the same person the one prior in time should prevail.

REVIEWS.

SELECT CASES IN THE COURT OF REQUESTS. 1497–1569. Edited for the Selden Society by I. S. Leadam. London: 1898. pp. viii, 257.

The appearance of this latest volume of the publications of the Selden Society emphasizes a change that has gradually come about since, in the first volume, Professor Maitland wrote that (the aim of the Society being the publication of materials for legal history) a critical description of the manuscripts used would be a sufficient introduction. In the present volume the Introduction is half the work, and much the more important half. It is a capital introduction, and we are glad to have it; but we should also welcome a volume chiefly filled with "materials for legal history," — the long-promised second volume of "Select Pleas of the Crown," for example.